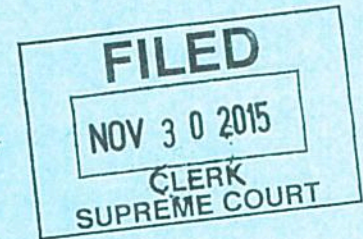


**Commonwealth of Kentucky
Supreme Court**

No. 2014-SC-0468-DR



LEON M. GRIDER

APPELLANT

On Review from the Court of Appeals

No. 2011-CA-002003

Appeal from Adair Circuit Court

Hon. James L. Bowling, Judge

Indictment No. 05-CR-0090

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by,

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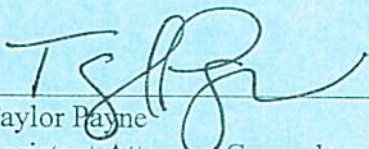
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CERTIFICATE OF SERVICE

I certify that a copy of the Brief for Commonwealth has been served November 30, 2015 as follows: by mailing to the trial judge, Hon. Judy D. Vance, Judge, Adair Circuit Court, 201 Campbellsville Street, Suite 101, Colombia, Kentucky 42728; by sending electronic mail to Hon. Gail Williams, Commonwealth Attorney; and by delivery through United States Mail to Hon. J. Vincent Aprile II, 500 West Jefferson Street, Suite 2100, Louisville, Kentucky 40202. The record was not checked out of the Clerk of this Court's Office by the Commonwealth.


Taylor Payne

Assistant Attorney General

INTRODUCTION

The Kentucky Court of Appeals affirmed an Adair Circuit Court final judgment finding the Appellant, Leon Grider, guilty of First-Degree Trafficking in a Controlled Substance and sentencing him to nine years' imprisonment, probated for five years. This Court granted discretionary review of that opinion on the issue of "whether the trial court erred in choosing to admonish the jury to disregard the testimony of the Chief of Police regarding other criminal investigations of [Grider] involving the informant in this case, after such evidence had been precluded by the trial court on a motion in limine."

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issue raised on discretionary review may be adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

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COUNTERSTATEMENT OF THE CASE

The Kentucky Court of Appeals aptly summarized the underlying facts as follows:

On August 23, 2005, Grider was indicted in Adair County on one count of trafficking in a controlled substance in the first degree, first offense, a violation of Kentucky Revised Statutes (KRS) 21A.1412, a Class C felony, and one count of trafficking in a controlled substance in the third degree, first offense, a violation of KRS 218A.1414, a Class A misdemeanor. On May 30, 2006, the misdemeanor charge was dismissed. At the time, Grider was a pharmacist and owner of three drug stores, each named Grider Drugs, with pharmacies in Russell Springs, Russell County, Kentucky.

Kentucky State Police Detective Scott Hammond was working on the Drug Enforcement Special Investigations Unit when he received a complaint from the Kentucky Board of Pharmacy concerning Grider Drug Stores. Detective Hammond contacted Joe Michael Irvin, the Chief of Russell Springs Police Department, to assist him in his investigation.

Irvin and Hammond used Lea Wilson as their confidential informant ("CI"). While working as a CI in this case, Wilson was addicted to drugs, was a paid informant, and continued to sell illegally controlled substances. Wilson lived in a mobile home in Adair County, which is adjacent to Russell County. On June 4, 2004, Wilson telephoned Grider and asked him to bring her four or five methadone pills. The officers attempted to set up recording equipment in Wilson's home but the equipment failed to work. The officers eventually placed a video recorder under a chair angled toward the door where a person would enter Wilson's trailer.

The officers went down the road from Wilson's home and hid in a secluded wooded area. As a result, none of the officers were present at Wilson's mobile home nor were they in position to identify either the vehicle that drove up to the mobile home or the person who exited the vehicle and entered the mobile home.

The video recorder recorded a transaction between Wilson and another person, in which Wilson received a distributor's bottle of 100 methadone pills and a taped-up strip of paper containing 60 Xanax pills. The other person in the video is viewed only from the neck down based on the angle of the camera. The person in the recording does not ask Wilson

for payment; instead he asks if Wilson is afraid and does she want him to stay the night? Wilson testified that his person was Grider.

Officer Jamie Rogers testified that he surveilled Grider on June 4, 2004, in anticipation of the controlled buy. Officer Rogers lost sight of Grider prior to the Wilson transaction. At the time he lost sight of Grider, he was traveling in Russell County on a road that would have taken him to Adair County and Wilson's home. Officer Rogers testified that Grider was wearing the same color pants and shirt as the person in the video recording at Wilson's home. However, the police report that Officer Rogers filed in 2004 described Grider as wearing a shirt and pants different from both his trial testimony and the person in the video recording.

During defense counsel's cross-examination, Chief Irvin testified that Wilson had worked for him as a CI on "the other trafficking cases involving Mr. Grider in Russell County." The trial court had previously ruled said evidence of other charges pending in Russell County against Grider inadmissible. The court denied defense counsel's motion for a mistrial."

The Commonwealth played for the jury a video deposition of Grider in *Leon and Anna Mae Grider v. City of Russell Springs, Kentucky, et al.*, taken in a federal case and conducted on May 20, 2011. During the deposition Grider states that he delivered some prescriptions to Wilson, but not the controlled substances or the methadone. Grider in response to questioning, discussing going to Wilson's residence and also describes evidence seen in the tape during the transaction with Wilson.

After hearing the aforementioned evidence, the jury deliberated and convicted Grider of first-degree trafficking in a controlled substance, first offense, and sentenced him to nine years' imprisonment probated for five years.

Grider v. Commonwealth, No. 2011-CA-002003-MR, at *2-4 (Ky. App. March 7, 2014).

On direct appeal to the Kentucky Court of Appeals, Grider alleged, along with other errors, that the court erred when it denied his motion for a mistrial based on the testimony of Chief Irvin that contained subject matter previously ruled inadmissible by the court. *Id.* at *4-5. The Court affirmed Grider's conviction, finding that although the testimony was improper, the trial court's admonishment to the jury cured any prejudice

and thus Grider's motion for a mistrial was properly denied. (*Id.* at *12).

Grider moved this Court for discretionary review, which was granted for the sole purpose of determining "whether the trial court erred in choosing to admonish the jury to disregard the testimony of the Chief of Police regarding other criminal investigations of the Defendant involving the informant in this case, after such evidence had been precluded by the trial court on a motion in limine." This Court denied the motion for discretionary review with respect to the other issues raised.

This Brief is timely filed in response to Appellant's Brief. Additional facts may be set forth below

ARGUMENT

The Trial Court Acted Within its Sound Discretion to Determine That An Admonition Would Cure the Erroneous Introduction of Chief Irvin's Testimony that Appellant was Involved with Other Drug Trafficking Cases.

A trial court has broad discretion to determine whether to grant a mistrial or admonish the jury when improper evidence is introduced. *St. Clair v. Commonwealth*, 455 S.W.3d 869, 892 (Ky. 2015) (citing *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005)). The “decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion.” *St. Clair*, 455 S.W.3d at 892 (citing *Matthews*, 163 S.W.3d at 17). An abuse of discretion occurs when the “decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

Trial courts are encouraged to give admonitions rather than mistrials, which are instructed to “be granted sparingly and only ‘if [the] harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way’ or if there is a ‘manifest, urgent, or real necessity.’” *St. Clair*, 455 S.W.3d at 892 (quoting *Matthews*, 163 S.W.3d at 17). On the other hand, “an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition.” *Id.* (footnote citations omitted).

Thus, a court abuses its discretion with respect to giving an admonition, rather than granting a motion for a mistrial, only if the admonition failed to cure the error.

There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial."

Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (citing *Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993); *Bowler v. Commonwealth*, 558 S.W.2d 169, 171 (Ky. 1977)).

Neither exception applies to the circumstances at hand. The only possibility that the admonition faltered to cure the error is found under the first exception. The second exception has no application. A review of the circumstances and analogous precedent demand a finding that the admonition cured the admission of the erroneous testimony.

In this case, during defense counsel's cross-examination of Chief Irvin, counsel asked, "Did Leah Wilson ever work for you as a confidential informant - directly for you?" (VR 8/9/11; 1:19:15). Chief Irvin responded, "On the other trafficking cases involving Mr. Grider in Russell County." (*Id.*). Defense counsel immediately objected and moved for a mistrial. (VR 8/9/11; 1:20:50). The judge denied the motion and advised the parties that he would admonish the jury and permitted defense counsel to craft an admonition. (*Id.*). The court then admonished the jury that:

There was an objection to the Chief's response and I would admonish you to disregard his response to that question and I remind you that we are here to determine one offense and one offense only.

(VR 8/9/11; 1:26:50). Grider's criminal charges in Russell County were not again addressed during the trial.

The circumstances present here are analogous to three cases in which this Court determined that the erroneous introduction of inadmissible testimony of a police officer regarding the prior bad acts of a defendant was curable with an admonition. Specifically, in *St. Clair*, this Court determined that the trial court properly exercised its discretion to admonish the jury to disregard improper prior bad acts evidence introduced through a Kentucky State Trooper that the defendant was already wanted for murder in Kentucky and that he was a danger to friends who sheltered him rather than granting the defendant's motion for a mistrial. 455 S.W.3d at 891-92. This Court held that the defendant failed to prove that the testimony was so devastating as to rebut the presumptive effectiveness of the trial court's admonition. *Id.* at 892. Thus, working under that assumption, the Court determined that the admonition cured the error and thus a mistrial was not warranted. *Id.*

In *Sherroan v. Commonwealth*, 142 S.W.3d 7 (Ky. 2004), the prosecutor twice elicited testimony, once from a police officer involved with the defendant's case, that the defendant was on probation despite a prior trial court ruling that such evidence was precluded pursuant to KRE 404(b) and KRE 103(d). *Id.* at 16-17. The trial court denied defendant's motions for a mistrial and offered to admonish the jury to disregard the testimony on both occasions, which the defendant rebuffed. *Id.* at 17. Yet, ruling that an admonition would have cured the error, this Court stated, "it would be tenuous to conclude that the jury was incapable of ignoring such brief and undetailed remarks regarding Appellant's probation, and even more tenuous to conclude that they were

‘devastating’ to his defense.” *Id.* (citation omitted).

Finally, In *Kinser v. Commonwealth*, 741 S.W.2d 648 (Ky. 1987) this Court determined that an admonition cured a police officer’s testimony that he believed the defendant committed the murder. *Id.* at 653. The Court noted that the prejudicial effect of the testimony was minimal because the officer “did not give opinions or conclusions on ultimate issues so as to invade the province of the jury.” *Id.* Therefore, any possible prejudice was cured by the admonition. *Id.*

In contrast, this Court has held that a witness’s inadmissible hearsay testimony that the defendant’s accomplice told her the defendant killed the victim was “so devastating as to be incurable by a mere admonition to disregard it.” *Terry v. Commonwealth*, 153 S.W.3d 794, 800-01 (Ky. 2005). Relying on a United States Supreme Court opinion, this Court acknowledged that in “some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical limitations of the jury system cannot be ignored.” *Id.* (citing *Bruton v. U.S.*, 391 U.S. 123, 135-36, 88 S.Ct. 1620, 1627-28, 20 L.Ed.2d 476 (1968)). In *Bruton*, that context arose when a codefendant deliberately made powerfully incriminating statements against the defendant to the jury in a joint trial. *Id.* This Court found the issue to be “whether the jury could properly consider the statements against the declarant but disregard it with respect to the codefendant. *Terry*, 153 S.W.3d at 801. Because the statements were admissible against the declarant, but inadmissible against Appellant, this Court determined that the admonition could not cure the error and remanded the case for a new trial. *Id.*

Turning back to the case at hand, the inadmissible testimony was not of the “devastating” character as that addressed in *Terry* and *Bruton* because it did not directly implicate Grider in the crime for which he was charged. See *Chandler v. Commonwealth*, No. 2007-SC-0008810MR, 2009 WL 1108878 (Ky. April 23, 2009).¹ Furthermore, the testimony was not deliberately introduced by a codefendant, as in *Bruton*, for the purpose of poisoning the jury against the defendant and exculpating the codefendant. Also, unlike in *Terry* and *Bruton*, contemplation of the inadmissible testimony did not require the jury to disregard it as to a codefendant while using it against the declarant. Rather, the testimony at issue here is more similar to that addressed by this Court in *St. Clair*, *Sherroan*, and *Kinser*. The testimony was a brief response by a police officer regarding a prior bad act that was immediately objected to and ordered to be disregarded by the jury in a clear and forceful admonition. Notably, several of Grider’s arguments opposing the efficacy of the admonition are directly refuted by these cases. Specifically, the fact that the testimony was introduced through a police officer does not rebut the presumptive curative effects of the admonition, See *St. Clair* 455 S.W.3d at 892, *Sherroan*, 142 S.W.3d at 16 and *Kinser*, 741 S.W.2d at 653; nor does the fact that the evidence was introduced despite being ruled inadmissible by the trial court in a pre-trial order. See *Sherroan* 142 S.W.3d at 16. The admonition was clear and unmistakable with respect to its instruction to the jury. The response was brief and a minimal with respect to the amount of evidence introduced throughout the trial. Such brief testimony that Grider was involved in other trafficking cases is not devastating to the defense to overcome the presumption that the

¹Cited in accordance to CR 76.28©) and attached as Appendix 1.

trial court's direct and clear admonition cured the error of its admission.

Grider also suggests that a mistrial was the appropriate remedy because the prosecution failed to act as a minister to justice when its witness injected the inadmissible testimony during defense's cross-examination. However, this Court's review of whether a trial court abused its discretion by giving an admonition rather than granting a mistrial "is not for the purpose of punishing the prosecutor, but rather to assess the overall fairness of the trial." *Jacobsen v. Commonwealth*, 376 S.W.3d 600, 611 (Ky. 2012) (citing *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987)). Additionally, in this case, the prosecutor did not elicit the inadmissible information - the response was a truthful answer to a defense question. The answer was neither unresponsive, as Grider suggests, nor a malicious or inflammatory response to deliberately sway the jury. It is reasonable to conclude that Chief Irvin responded to a question that was attempting to solicit further details of his working relationship with the confidential informant. His brief mention of another trafficking case is not an "event [] of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." *Maxie v. Commonwealth*, 82 S.W.3d 860, 862 (Ky. 2002).

The Commonwealth presented an overwhelming case against Grider. *See Phillips v. Commonwealth*, 679 S.W.2d 235, 237 (Ky. 1984) ("[w]here evidence of other crimes is introduced into evidence through the non-responsive answer of a witness, this court must look at all of the evidence and determine whether the defendant has been unduly prejudiced by that isolated statement[]"). The confidential informant positively identified Grider as illegally giving her controlled substances upon request. The jury also viewed a

videotape of the drug transaction and heard the testimony of police officers conducting surveillance of the drug transaction. Furthermore, the confidential informant was fully impeached by defense counsel regarding her drug use and prior criminal history, yet the jury still found her credible because the defense was unable to impeach her in a manner that indicated she had a motive to lie in this situation. Based on that evidence the jury recommended a sentence of nine years' imprisonment, or ten percent less than the maximum sentence allowed. In this context, no strong likelihood exists that the inadmissible testimony was devastating to the defense to prove the admonition did not cure any possible prejudice the defense faced. Since no evidence suggests that the admonition did not cure the error, the trial court properly exercised its discretion to deny Grider's motion for a mistrial.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the conviction of Appellant.

Respectfully Submitted

JACK CONWAY

Attorney General of Kentucky

A handwritten signature in black ink, appearing to read 'T. Payne', written over the printed name 'Taylor Payne'.

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